FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-63.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief for Respondent.

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Questions Presented.

1. Where the Massachusetts Supreme Judicial Court found that the City of Revere waived any objection to the standing of the Massachusetts General Hospital ("MGH"), may Revere raise the argument for the first time in this Court and, if so, does MGH have standing under federal law to assert the treatment rights of its patient in the custody of Revere?

2. Does the remedial system developed by the Massachusetts Supreme Judicial Court to implement pre-trial detainees' substantive constitutional right to necessary medical treatment raise a substantial federal issue for this Court to review?

3. In order to protect the constitutional rights of pre-trial detainees, may a state require its municipalities to bear, at least in the first instance, the costs of medical care provided to the detainees at the municipalities' request?

Table of Contents.

Summary of argument 1

Argument 3

I. The Supreme Judicial Court's consideration of the Eighth Amendment instead of the Fourteenth is harmless error because both provisions require the government to care for persons in custody 3

II. The standing argument raised by Revere in this court is without merit 5

A. This court may not review the Supreme Judicial Court's determination that MGH had standing to proceed in state court 5

B. If this court were to consider the standing argument, it should find that MGH has standing as a matter of federal law 6

C. If this court were to find that MGH has no standing under federal law, it should not disturb the Supreme Judicial Court's finding under state law, but should dismiss the writ 7

III. Massachusetts' adoption of a remedial rule to insure provision of constitutionally required medical care is a legitimate exercise of the state's authority to govern its own internal affairs 10

A. Massachusetts' effort to implement accepted constitutional norms presents no federal question for review by this court 10

B. Even if a federal question is intertwined in Supreme Judicial Court's decision, this court should not risk reviewing state law issues by considering the merits 12

IV. Even if this court were to review the state's remedy, it should do so with deference 15

A. In seeking to insure protection of constitutional rights, Massachusetts may assume for itself a broader remedial system than the federal courts could properly impose 18

B. The remedial system adopted by the Supreme Judicial Court reflects that court's greater familiarity with Massachusetts laws and concerns 25

V. Revere's constitutional obligation to provide necessary medical care for detainees in its custody includes, at least in the first instance, the obligation to pay for that care 29

Conclusion 36

Table of Authorities Cited.

Cases.

Abington School District v. Schempp, 374 U.S. 203 (1963) 31n

Air Reduction Company v. Hickel, 420 F.2d 592 (D.C. Cir. 1969) 7n

Alfred L. Snapp & Son v. Puerto Rico, 73 L.Ed.2d 995 (1982) 29n

Backman v. Secretary of the Commonwealth, 387 Mass. 549 (1982) 8

Baird v. Attorney General, 371 Mass. 741, 360 N.E.2d 288 (1977) 27

Barrows v. Jackson, 346 U.S. 249 (1953) 7n

Bates v. Arizona, 433 U.S. 350 (1977) 19n

Beach v. District of Columbia, 320 F.2d 790 (D.C. Cir. 1963) 32

Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967) 24n

Beckwith v. United States, 425 U.S. 341 (1976) 25n

Bell v. Wolfish, 441 U.S. 520 (1979) 3

Bellotti v. Baird, 428 U.S. 132 (1976) 14n

Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976) 22n

Betts v. Brady, 316 U.S. 455 (1945) 23

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 21

Board of Education v. Pico, 73 L.Ed.2d 435 (1982) 25n

Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977) 3n, 17n

Boynton v. Virginia, 364 U.S. 454 (1960) 4

Braxton v. West Virginia, 208 U.S. 192 (1908) 9

Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956) 7n

Carey v. Piphus, 435 U.S. 247 (1978) 24n

Carlson v. Green, 446 U.S. 14 (1980) 21n, 22, 24, 29

Chandler v. Florida, 449 U.S. 560 (1981) 21n

Chapman v. California, 386 U.S. 18 (1967) 6n

City of Mesquite v. Aladdin's Castle, Inc., 71 L.Ed.2d 152 (1982) 11n, 13, 15n, 25n

City of Monell v. Department of Social Services, 436 U.S. 658 (1978) 35n

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 29n

Coleman v. Miller, 307 U.S. 433 (1939) 8, 9
Commissioner of Correction v. Myers, 379 Mass. 255, 399 N.E.2d 452 (1979) 27
Commonwealth v. Golston, 373 Mass.249, 366 N.E.2d 744 (1977), cert. denied, 434 U.S. 1039 (1978) 27
Commonwealth v. Sheppard, 387 Mass. 488 (1982) 14n
Connor v. Finch, 431 U.S. 407 (1977) 19
Cooper v. Mitchell Brothers, 70 L.Ed.2d 262 (1982) 11, 13n
Costello v. Wainwright, 525 F.2d 1239 (5th Cir. 1976) 30
Crawford v. Los Angeles Board of Education, 73 L.Ed. 2d 948 (1982) 22n
Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978) 26
Custody of a Minor, 385 Mass. 697, 434 N.E.2d 601 (1982) 26
Davis v. Passman, 442 U.S. 228 (1979) 22n
Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965) 14n
DeSylva v. Ballantine, 351 U.S. 570 (1956) 24n
Doremus v. Board of Education, 342 U.S. 429 (1952) 8
Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976) 3n
Durley v. Mayo, 351 U.S. 277 (1956) 13n
Elkins v. United States, 364 U.S. 206 (1960) 23
Engle v. Isaac, 71 L.Ed.2d 783 (1982) 6
Estelle v. Gamble, 429 U.S. 97 (1976) 10
Ex Parte Royall, 117 U.S. 241 (1886) 16n
Fant v. Fisher, 414 F.Supp. 807 (W.D. Okla. 1976) 32n
Fare v. Michael C., 442 U.S. 707 (1979) 24n
Fay v. Noia, 372 U.S. 391 (1963) 6n

Federal Energy Regulation Commission v. Mississippi, 72 L.Ed.2d 532 (1982) 9n, 19n, 21n

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Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 13

Frothingham v. Mellon, 262 U.S. 447 (1923) 8n

Fullilove v. Klutznick, 448 U.S. 448 (1980) 18

Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) 30

Gideon v. Wainwright, 372 U.S. 335 (1963) 16n, 23, 30, 31

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 12n

Gordon v. Lance, 403 U.S. 1 (1971) 12n

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) 3

Griffin v. Illinois, 351 U.S. 12 (1956) 19, 22n, 30, 31

Griswold v. Connecticut, 381 U.S. 479 (1965) 6

Guardianship of Roe, Mass. Adv. Sh. (1981) 981, 421 N.E.2d 40 26

Harris v. McRae, 448 U.S. 297 (1982) 7, 16, 31

Harris v. Rivera, 70 L.Ed.2d 530 (1981) 22

Harrison v. NAACP, 360 U.S. 167 (1959) 15n, 25n

Henry v. Mississippi, 379 U.S. 443 (1965) 6n

Herb v. Pitcairn, 324 U.S. 117 (1945) 13, 14

Hills v. Gautreaux, 425 U.S. 282 (1976) 18

Hodel v. Virginia Surface Min. & Recl. Ass'n, 452 U.S. 264 (1981) 9n

Hospital Services, Inc. v. Duman, 297 N.W.2d 320 (N. Dak. 1980) 28n

Howard v. Warden, 348 F.Supp. 1204 (E.D. Va. 1972), app. dismissed, 474 F.2d 1341 (4th Cir. 1973) 22n

Hughes v. Superior Court, 339 U.S. 460 (1950) 12

Idaho Department of Employment v. Smith, 434 U.S. 100 (1977) 15n

Imbler v. Pachtman, 424 U.S. 409 (1976) 21n, 24n

Ingraham v. Wright, 430 U.S. 651 (1977) 3

Inmates of Allegheny Cty. Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979) 3n

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In Re Dinnerstein, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978) 27

In Re Moe, 385 Mass. 555, 432 N.E.2d 712 (1982) 26

In re Quinlan, 40 N.J. 10, 355 A.2d 647, cert. denied sub nom. Gorger v. New Jersey, 429 U.S. 922 (1976) 26n

In re Spring, Mass. Adv. Sh. (1980) 1209, 405 N.E.2d 452 (1979) 26

Isaac v. United States, 490 F. Supp. 613 (S.D. N.Y. 1979) 17n

James v. Strange, 407 U.S. 128 (1972) 31

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965) 13n

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Ker v. California, 374 U.S. 23 (1963) 21n, 23
King County v. Seattle, 70 Wash. 2d 988, 425 P.2d 887 (1967) 28n
Klinger v. Missouri, 13 Wall. 257 (1871) 13n
Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972) 15n
Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978) 27
Larson v. Valente, 72 L.Ed.2d 33 (1982) 15n, 26n
Lutheran Medical Center v. Omaha, 204 Neb. 292, 281 N.W.2d 786 (1979) 28n
McKane v. Durston, 153 U.S. 684 (1894) 20n
McNeal v. Culver, 365 U.S. 109 (1961) 23
Mapp v. Ohio, 367 U.S. 643 (1961) 23
Marshall v. Dye, 231 U.S. 250 (1913) 8
Maryland v. Louisiana, 68 L.Ed.2d 576 (1981) 7n
Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942) 13n
Michigan v. Tucker, 417 U.S. 433 (1974) 21n
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Milliken v. Bradley, 433 U.S. 267 (1977) 18
Mills v. Rogers, 73 L.Ed.2d 16 (1982) 15n
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 12n, 24
Minnesota v. National Tea Co., 309 U.S. 551 (1940) 11, 13, 14
Miranda v. Arizona, 384 U.S. 436 (1966) 20, 22n, 33n, 36

Missouri ex rel. Southern Railway Company v. Mayfield, 340 U.S. 1 (1950) 11

Moe v. Secretary of Administration and Finance, Mass. Adv. Sh. (1980) 464, 417 N.E.2d 387 11

Moor v. County of Alameda, 411 U.S. 693 (1973) 24n

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North Carolina v. Butler, 441 U.S. 369 (1979) 24n

Oregon v. Hass, 420 U.S. 714 (1975) 14, 15n, 24

O'Sullivan v. Felix, 233 U.S. 318 (1914) 24n

Palmer v. Thompson, 403 U.S. 217 (1971) 22n

Parham v. J.R., 442 U.S. 584 (1979) 31

Parratt v. Taylor, 68 L.Ed.2d 420 (1981) 21n, 36

Patmore v. Carlson, 392 F. Supp. 737 (E.D. Ill. 1975) 22n

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Patsy v. Florida Board of Regents, 73 L.Ed.2d 172 (1982) 13n
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Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) reversed on other grounds sub nom. Alabama v. Pugh, 738 U.S. 781 (1978) 16n
Railroad Commission v. Pullman Co., 319 U.S. 496 (1941) 15n, 33n
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 28n
Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946) 24n
Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 13
Rhodes v. Chapman, 452 U.S. 337 (1981) 16n
Rinaldi v. Yeagar, 384 U.S. 305 (1966) 31
Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969) 17n
Rizzo v. Goode, 423 U.S. 362 (1976) 19n
Robertson v. Wegmann, 436 U.S. 584 (1978) 24, 29
Rose v. Lundy, 71 L.Ed.2d 379 (1982) 15n
Ross v. Moffitt, 417 U.S. 600 (1974) 28n
Scott v. Illinois, 440 U.S. 367 (1979) 23n, 36
Sailors v. Board of Education, 387 U.S. 105 (1967) 12n
Santosky v. Kramer, 71 L.Ed.2d 599 (1982) 21n, 26n
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Singleton v. Wulff, 428 U.S. 106 (1976) 6

Smith v. Indiana, 191 U.S. 138 (1903) 8
Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944) 15n
Spicer v. Williamson, 191 N.C. 487, 132 S.E. 291 (1926) 28n
Stanley v. Illinois, 405 U.S. 645 (1972) 4
Stembridge v. Georgia, 434 U.S. 541 (1952) 13n
Stewart v. Kansas City, 239 U.S. 14 (1915) 9
Stimpson v. Hunter, 234 Mass. 61, 125 N.E. 155 (1919) 28n
Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 24n
Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) 27
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 18
Terminello v. Chicago, 337 U.S. 1 (1949) 4
Textile Workers of America v. Lincoln Mills, 353 U.S. 448 (1957) 24n
Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977) 17n, 30
Toll v. Moreno, 73 L.Ed.2d 563 (1982) 28n
Trenton v. New Jersey, 262 U.S. 182 (1923) 9
Truax v. Raich, 239 U.S. 33 (1915) 7n
Tulsa v. Hillcrest Medical Center, 292 P.2d 430 (Okla. 1956) 28n
Tyler v. Judges, 179 U.S. 405 (1900) 8
U.A.W. v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 24n
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United States v. Mendenhall, 446 U.S. 544 (1980) 31
United States v. Yazell, 382 U.S. 341 (1966) 29n
Upham v. Seamon, 71 L.Ed.2d 725 (1982) 18, 25n

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Wainwright v. Sykes, 433 U.S. 72 (1977) 6

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Welsh v. Likens, 373 F. Supp. 487 (D. Minn. 1974) 30

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Williams v. Mayor, 289 U.S. 36 (1933) 9

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 15n, 25n

Wise v. Lipscomb, 437 U.S. 535 (1978) 18

Wolf v. Colorado, 338 U.S. 25 (1949) 23

Wuchter v. Pizzutti, 276 U.S. 13 (1928) 4

Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) 30, 36

Youngberg v. Romeo, 73 L.Ed.2d 28 (1982) 30, 31

Younger v. Harris, 401 U.S. 37 (1971) 19, 29n

Zant v. Stephens, 72 L.Ed.2d 222 (1982) 14n

STATUTES.

United States Constitution.

Article III 2, 6

First Amendment	22n
Fourth Amendment	21
Fifth Amendment	22n
Sixth Amendment	22n
Eighth Amendment	3, 4, 10n, 22n, 28n et seq.
Ninth Amendment	22n
Eleventh Amendment	22n
Fourteenth Amendment	4, 10n, 11, 22n, 32
42 U.S.C.	
§ 291	33
§ 1983	21n, 24
§ 1988	24n
42 C.F.R.	
§ 435.1008(a)(i)	34n
§ 435.1009	34n
47 Fed. Reg. 43578 et seq.	34n
Massachusetts General Laws	
c. 6A, §§ 37-46	34
c. 29, § 63	8n
c. 111C	
§ 14	32n
§ 70E(k)	33
Mass. St. 1979, c. 214	33
Mass. St. 1980, c. 540	34, 35n
Mass. St. 1981, c. 432	34
Mass. St. 1982, c. 372	34

MISCELLANEOUS.

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Note, 34 Minn. L. Rev. 134 (1950) 28n

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N. Ward, Massachusetts Body of Liberties (1641) 27n, 28n

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Brief for Respondent.

Summary of Argument.

The state court's consideration of substantive rights provided by the Eighth Amendment is harmless error, since unconvicted prisoners have rather than the Fourteenth even greater rights to medical care under the Fourteenth Amendment.

In this Court, Revere claims for the first time that the Massachusetts General Hospital ("MGH") lacks standing. The Massachusetts Supreme Judicial Court's express finding under state law that Revere waived this argument is an independent state ground of decision not subject to review here. If the Court were to consider the question, it should find that MGH

does have standing under federal law to assert the rights of its patients in custody so those rights will be vindicated. And even if the Court were to find no federal standing, it should dismiss the writ of certiorari, since the state courts are bound by neither the Article III nor the prudential considerations on which federal standing rules are based. Moreover, Revere is but a municipality created by Massachusetts, and so has no standing itself to challenge a state rule requiring it to assume certain costs related to its police activities.

The remedial system created by the Supreme Judicial Court is a matter of state law. State law does not become federalized merely because it is intended to protect federal rights. Even if some federal law were intertwined in the decision below, this Court should take appropriate steps to insure that it is not passing on questions of state law or rendering an opinion that may prove to be merely advisory.

Massachusetts has a legitimate interest in protecting the constitutional rights of pretrial detainees. While a federal court must minimize its intrusion into state autonomy, the state courts are not so constrained. The state, whether through its legislature or its courts, may do more than is minimally necessary to prevent constitutional violations and may do so in a way that furthers other state policies.

Thus, if the Court were to reach the merits, it should give a measure of deference to the state court's remedy because Massachusetts is in the best position to determine the optimal way to protect the rights of its detainees, and no federal interest requires creation of a uniform national remedy for state pre-trial detainees.

A person in custody is entitled to *receive* appropriate care, not merely to have an opportunity to purchase it. Although Revere is not precluded from seeking reimbursement from a third-party payor or even from the detainee himself, in the first instance the obligation falls directly on the City and not on MGH. The Supreme Judicial Court's rule insures that detainees will receive necessary medical care as required by the Constitution.

Argument.

I. The Supreme Judicial Court's Consideration of the Eighth Amendment Instead of the Fourteenth is Harmless Error Because Both Provisions Require the Government to Care for Persons in Custody.

The Supreme Judicial Court based its decision on the need to protect the Eighth Amendment rights of persons in custody. 385 Mass. 772, 776 (1982). Because Kivlin was a pretrial detainee and not a convicted prisoner when he was brought to the Massachusetts General Hospital ("MGH"), the Hospital acknowledges that the relevant federal constitutional provision is the Due Process Clause of the Fourteenth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979); *Ingraham* v. *Wright*, 430 U.S. 651, 671-672 & n.40 (1977).[1]

The Supreme Judicial Court's consideration of the Eighth Amendment, however, does not undermine that court's decision. The due process rights of a suspect in custody (and still presumed innocent) are at least as great as the Eighth Amendment protections available to a prisoner already adjudicated guilty, and the corresponding governmental obligations are also at least as great. *Bell* v. *Wolfish*, *supra* at 545; *see Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 23 n.1 (1979) (Marshall, J., dissenting). "[T]he conditions for pretrial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for the crimes they have committed against society." (Citations omitted.) *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676, 686 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (1st Cir.), *cert. denied sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977 (1974).[2]

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[1] These decisions were not raised by Revere in the proceedings below, but were cited for the first time by Revere in its petition for certiorari.

[2] *See also Inmates of Allegheny Cty. Jail* v. *Pierce*, 612 F.2d 754 (3d Cir. 1979) ("anomalous to afford a pretrial detainee less constitutional protection than one who has been convicted"); *Bowring* v. *Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (medical treatment for serious disease or injury required by Due Process Clause); *Duran* v. *Elrod*, 542 F.2d 998, 999-1000 (7th Cir.

Clearly, the Supreme Judicial Court's rationale — the prisoner's inability to care for himself — applies with equal force to a person under arrest but not convicted.[3] The only change in argument is purely nominal: the same analysis under a different constitutional rubric. Moreover, Revere has fully briefed the Fourteenth Amendment argument, and does not suggest that the ultimate result in the state court or in this Court turns on whether the analysis proceeds under the Eighth or Fourteenth Amendment.

Nor is there any prudential basis for now requiring greater precision from the Supreme Judicial Court. This Court has often decided cases on grounds analogous, though not identical, to those raised by the parties below. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), for example, the court converted a due process claim into equal protection analysis, *id.* at 658 n.10, over the dissent's objection that the grounds would come as a surprise to the prevailing party and the courts below, *id.* at 662. *See also Boynton* v. *Virginia*, 364 U.S. 454, 464 & n.2 (1960) (Whittaker, J., dissenting) (case decided under Interstate Commerce Act rather than the constitutional grounds consistently urged by petitioner); *Terminello* v. *Chicago*, 337 U.S. 1, 10 n.1 (1949) (Frankfurter, J., dissenting) (decision on constitutional argument never raised in state court); *Wuchter* v. *Pizzutti*, 276 U.S. 13, 25 (1928) (Brandeis, J., dissenting) (majority permits new line of argument).

Although this Court might choose to remand the case to allow the Supreme Judicial Court to consider whether payment in furtherance of Fourteenth Amendment (rather than

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1976) (more stringent standard when caring for pre-trial detainees); *Newman* v. *Alabama*, 503 F.2d 1320, 1330 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (Due Process Clause is "equally satisfactory constitutional repository of these rights and obligations"); *Johnson* v. *Glick*, 481 F.2d 1028, 1032 (2d Cir.) (Friendly, J.) (unconvicted prisoners must be at least as well cared for), *cert. denied sub nom. Employee-Officer John* v. *Johnson*, 414 U.S. 1033 (1973).

[3] Indeed, in guaranteeing the constitutional rights of unconvicted detainees, the Supreme Judicial Court presumably expected that it was resolving the issue for convicted prisoners as well. 385 Mass. at 777, 780 n.11.

Eighth Amendment) rights is appropriate,[4] it should be reluctant to do so where there is no reasonable likelihood of a change in analysis or outcome.

II. The Standing Argument Raised by Revere in This Court is Without Merit.

In this Court, Revere argues for the first time that MGH lacks standing to assert the constitutional rights of its patients (Pet. Br. 13-17). This section of MGH's brief first shows that the Supreme Judicial Court's finding that Revere waived this claim as a matter of state law may not be reconsidered by this Court, and that standing to proceed in the state court has been conclusively established. MGH next demonstrates that even if the Court were to consider the standing question under federal law, it should find that MGH may assert the constitutional rights of patients who are in pre-trial custody. In the conclusion of this section, MGH argues that the state court was free to hear this case even if MGH lacked standing as a matter of federal law, but that review by this Court would then be unavailable.

A. *This Court may Not Review the Supreme Judicial Court's Determination that MGH Had Standing to Proceed in State Court.*

The Supreme Judicial Court found, purely as a matter of state law, that Revere had waived any objection to MGH's standing by failing to raise the issue, and accordingly concluded that MGH had standing to proceed in the state judicial system.[5] This Court is required to respect that determination. The state court's finding of waiver is an independent state ground barring Supreme Court review of this issue. *See Engle*

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[4] It is reasonable to expect that the Supreme Judicial Court would permit the hospital to argue the Fourteenth Amendment, since otherwise the court would have been reversed (and the hospital's claim defeated) on the basis of cases never raised by Revere in the state courts.

[5] 385 Mass. at 776-77 n.7. The court cited the applicable state rule, Mass. R.App.P. 16(a)(4).

v. *Isaac*, 71 L.Ed.2d 783 (1982); *Webb* v. *Webb*, 68 L.Ed.2d 392, 398-399 & n.4 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72, 81 (1977) (contemporaneous objection rule).[8] Accordingly, this Court may not review the Supreme Judicial Court's determination that MGH had standing to pursue its claim in the Massachusetts courts.

B. *If This Court Were to Consider the Standing Argument, it Should Find that MGH Has Standing as a Matter of Federal Law.*

Revere does not claim that MGH lacks standing under Article III, presumably because MGH has suffered actual injury through Revere's failure to pay. There is thus an actual controversy between the parties. *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 70 L.Ed.2d 700, 709 (1982). Revere therefore relies upon the prudential federal limitations on a plaintiff's right to assert the interests of the third parties. *See id.* at 711.

If the Court were to reach the question of standing in this case, it should conclude that here, much as in other situations where providers of health care seek to protect the constitutional rights of their patients, there is standing. This Court has held that physicians have a sufficiently concrete injury and a close enough professional relationship to assert constitutional rights not easily asserted by their pregnant patients. *Singleton* v. *Wulff*, 428 U.S. 106, 112-118 (1976) (plurality opinion of Blackmun, J.). Similarly, physicians have standing to raise their patients' rights to contraception. *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965). And this Court never doubted that doctors had as much standing as their patients may have

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[8] There is no suggestion in this case that the state's waiver rule was itself applied in a way that violates any provision of the Constitution. *Compare NAACP* v. *Alabama*, 357 U.S. 449, 457-458 (1958); *see also Fay* v. *Noia*, 372 U.S. 391 (1963); *Henry* v. *Mississippi*, 379 U.S. 443 (1965). And even if this court were to review the question itself, it could not fail to agree that Revere waived the issue below. *See Chapman* v. *California*, 386 U.S. 18 (1967).

to assert a constitutional right to Medicaid funding for abortions. *Harris* v. *McRae*, 448 U.S. 297, 318 n.21 (1982).[7]

In allowing physicians the standing to assert the constitutional rights of their patients seeking contraceptives or abortions, the Court recognized that the people in these categories of patients would always be changing, and that often none of them would be in a good position to obtain judicial intervention before the immediate need had passed and the damage was done. Because of their professional relationship with these patients, the physicians (who themselves have an interest in providing approporiate medical care) are particularly appropriate litigants to protect the patients' rights. The same considerations apply to the class of pre-trial detainees. Those who are both injured and in custody may often be unable to assert effectively their right to medical treatment at the time the treatment is needed, and the group of detainees changes rapidly enough that an individual detainee may have little incentive to assert constitutional rights available to him as a member of the group.

C. *If This Court Were to Find that MGH has No Standing Under Federal Law, it Should Not Disturb the Supreme Judicial Court's Finding under State Law, but Should Dismiss the Writ.*

Even if this Court were to consider the standing question and conclude, contrary to the analysis above, that MGH lacks

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[7] For similar conclusions outside the context of medical care, see *Maryland* v. *Louisiana*, 68 L.Ed.2d 576, 589 (1981) (ultimate consumers on whom statutory tax would finally and inevitably fall); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (party ultimately bearing burden); *Barrows* v. *Jackson*, 346 U.S. 249, 255-258 (1953) (property owner asserts rights of potential non-white purchasers not parties to the suit); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925) (school asserts rights of present and prospective patrons); *Truax* v. *Raich*, 239 U.S. 33 (1915) (employee challenges hiring law directly applicable only to employer); *Air Reduction Company* v. *Hickel*, 420 F.2d 592, 594 (D.C. Cir. 1969) (producers and distributors of helium attack federal regulations applicable to their purchasers); *Brewer* v. *Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956) (school board's suit to protect pupils' civil rights); *National Ass'n for Advance. of Colored People* v. *Patty*, 159 F. Supp. 503 (E.D. Va. 1958), *rev'd on other grounds sub nom. Harrison* v. *NAACP*, 360 U.S. 167 (1959) (organization providing legal assistance asserts rights of actual or potential clients).

standing as a matter of federal law, it should respect the Supreme Judicial Court's right to apply its own state law of standing. The federal limitations reflect a prudential "rule of self-restraint" applied by the *federal* courts in cases where participation of the federal judiciary is inappropriate. However, as Professor Tribe succinctly comments:

> federal standing requirements, whether dictated by article III or suggested by policy, all arise out of institutional concerns peculiar to the federal judiciary and are therefore irrelevant to the question of what more generous standing rules a state may adopt if it chooses to do so.

L. Tribe, *American Constitutional Law*, § 3-18 at 81 (1978).

The state courts need not follow federal rules of standing; they are free to decide questions of federal law even where a federal court could not do so because of lack of standing. *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952). Massachusetts has not adopted the federal law of standing. *See Backman* v. *Secretary of the Commonwealth*, 387 Mass. 549, 559 n.5 (1982); *Wellesley College* v. *Attorney General*, 313 Mass. 722, 731, 42 N.E.2d 220 (1943).[8]

This Court's jurisdiction, however, is not expanded by a state court decision rendered under the state's broader rules of standing. If a case could not have been brought initially in federal court, it does not become a proper matter for federal review simply because the state court rendered a decision on the merits. *Princeton University* v. *Schmidt*, 70 L.Ed.2d 855, 858 n.* (1982); *Doremus* v. *Board of Education*, *supra*, 342 U.S. at 434; *Marshall* v. *Dye*, 231 U.S. 250 (1913); *Smith* v. *Indiana*, 191 U.S. 138 (1903); *Tyler* v. *Judges*, 179 U.S. 405 (1900); *see also Coleman* v. *Miller*, 307 U.S. 433, 466 (1939) (Frankfurter, J., dissenting in part).

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[8] For example, Massachusetts permits state court challenges to governmental expenditures on constitutional grounds when the federal courts would be closed under the doctrine of *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). *See, e.g.*, Mass. Gen. Laws c. 29, § 63.

Revere's request that this Court reverse the Supreme Judicial Court on the grounds that MGH lacks federal standing would impose the federal rules on the states even though the federal institutional concerns which underly the standing doctrine do not necessarily apply in state courts. The Court should decline to do so. L. Tribe, *American Constitutional Law*, § 3-18 at 81 (1978).[9] Thus Revere's argument that MGH lacks federal standing proves too much. If Revere is correct, this Court should decline to decide the merits of the case, but should instead dismiss the writ of certiorari.

The Court should be attentive to an additional reason for dismissing the writ of certiorari: Revere itself, being but a "creature of the state," lacks standing to appeal this Court "in opposition to the will" of its creator. *Coleman* v. *Miller, supra* at 441; *Williams* v. *Mayor*, 289 U.S. 36, 40 (1933); *Trenton* v. *New Jersey*, 262 U.S. 182, 186-187 (1923); *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 397 (1919); *Stewart* v. *Kansas City*, 239 U.S. 14, 16 (1915) (local governments "are instruments of the state, created to carry out its will"); *Braxton* v. *West Virginia*, 208 U.S. 192, 197 (1908) (regulation of municipal corporation is peculiarly within the domain of state control); *compare Washington* v. *Seattle School District No. 1*, 73 L.Ed.2d 896 (1982) (municipal body asserting constitutional rights of is constituents).[10] As MGH demonstrates in the following section, the state's apportionment of the costs of medical care among itself and its municipalities, private institutions and citizens is a matter of state law raising no federal question for this Court.

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[9] Naturally, the state determination of federal law which is not subject to Supreme Court review because of lack of standing will carry little precedential value outside the state's own judiciary. L. Tribe, *American Constitutional Law*, § 3-18 at 81 n.11 (1978).

[10] The allocation of fiscal responsibility among the various branches of the state is an exercise of state sovereignty in an area of integral governmental functioning over which the states traditionally exert control. Accordingly, this Court should not interfere. *Federal Energy Regulation Commission* v. *Mississippi*, 72 L.Ed.2d 532, 549-550 n.28 (1982); *Hodel* v. *Virginia Surface Min. & Recl. Ass'n*, 452 U.S. 264, 287-288 (1981); *National League of Cities* v. *Usery*, 426 U.S. 833, 845, 852-854 (1976). See Section III(A), below.

III. Massachusetts' Adoption of a Remedial Rule to Insure Provision of Constitutionally Required Medical Care is a Legitimate Exercise of the State's Authority to Govern its Own Internal Affairs.

If this Court finds sufficient federal standing, it must then proceed to the merits. The merits, however, do not involve the broad question Revere seeks to present to the Court: whether the Constitution requires a municipality to pay for medical services rendered to pre-trial detainees. Rather, the issue is a considerably narrower one requiring appropriate recognition of the states' role in our system of federalism: whether the state court's order directing municipalities to pay hospitals for the medical care provided to pre-trial detainees was a reasonable exercise of Massachusetts' authority to regulate its own internal affairs in implementing accepted constitutional norms. Thus, framed, the state court decision raises no substantial federal question for review by this Court.

A. *Massachusetts' Effort to Implement Accepted Constitutional Norms Presents No Federal Question for Review by This Court.*

In its decision below, the Supreme Judicial Court noted that, having shot and arrested Kivlin, the City of Revere was under "a legal duty to supply him with necessary medical care."[11] The court then concluded that "to ensure Kivlin's right to medical care, Revere must be held liable to the hospital for the medical services it rendered." This *implementing rule* was designed by the court to insure that constitutional rights of individuals in custody would not be neglected because of their possible inability to pay. The court apparently felt that if health care providers are assured payment for the

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[11] That constitutional right has been recognized in too many decision to require extensive citation. *See, e.g., Estelle* v. *Gamble*, 429 U.S. 97 (1976). Revere concedes "Kivlin's right not to be denied prompt access to medical care." Pet. Br. at 12, 18. The scope of that right is considered in more detail at n.22, below, and its constitutional sources (the Eighth and Fourteenth Amendments) are discussed in Section I, above.

care of persons in custody, treatment is more likely to be provided. *Compare Moe* v. *Secretary of Administration and Finance*, Mass. Adv. Sh. (1980) 464, 478, 417 N.E.2d 387 (lack of Medicaid reimbursement would discourage providers from performing abortions).

The burden is on Revere, as petitioner, to establish the existence of a constitutional issue to give this Court its jurisdiction. *Webb* v. *Webb*, 68 L.Ed.2d 392, 396 (1982); 28 U.S.C. § 1257(3). The city has not satisfied its burden. In holding Revere liable to MGH to insure Kivlin's constitutional right to medical care, the Supreme Judicial Court cited no federal cases and discussed no federal law.[12] There is no suggestion that the court believed itself bound by federal law to reach that particular result, or that it believed the same remedy should necessarily be applied in every state.[13] *See Cooper* v. *Mitchell Brothers*, 70 L.Ed.2d 262, 268 (1982) (Stevens, J., dissenting); *Missouri ex rel. Southern Railway Company* v. *Mayfield*, 340 U.S. 1, 5 (1950); *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 554-555 (1940). Rather, the Supreme Judicial Court adopted the payment remedy only after reviewing other relevant state law and concluding that it was insufficient to guarantee the provision of medical care.[14]

The court's determination that this remedy was appropriate in Massachusetts to protect detainees' rights does not of itself present a federal question for review by this Court. Had the payment rule been adopted by Massachusetts through its state legislature, Revere could have brought no colorable claim to this Court. The fact that a different branch of Massachusetts government — here, the judiciary — adopted the same remedy raises no federal issue for Supreme Court consideration. As this Court has frequently observed, "the Fourteenth

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[12] *Compare City of Mesquite* v. *Aladdin's Castle, Inc.*, 71 L.Ed.2d 152, 167 (1982) (Powell, J., dissenting in part).

[13] Indeed, other states have adopted other remedies under their own law. See n.45, below.

[14] It can also be assumed the state court was mindful of its other developments in the area of patients' rights, and was aware of the tight system of controlling hospital costs in Massachusetts. See Section IV(B) and Section V, below.

Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." *Hughes* v. *Superior Court*, 339 U.S. 460, 467 (1950). So long as Massachusetts does not violate individuals' constitutional rights, it may select any allocation of authority and may exercise plenary power over its instrumentalities of government, free from federal judicial review.[15] A state remedy is not federalized simply because it is adopted by the state to prevent possible constitutional violations. This is not to suggest that the states may adopt any remedial schemes they see fit in the name of protecting constitutional rights. But where a remedial rule's burden falls only upon municipal corporations created by the state, no constitutional interest is implicated.

B. *Even if a Federal Question is Intertwined in the Supreme Judicial Court's Decision, this Court Should Not Risk Reviewing State Law Issues by Considering the Merits.*

In the preceding section, MGH has argued that the Supreme Judicial Court sought to deter violations of the substantive constitutional rights of pre-trial detainees by fixing initial financial responsibility for necessary medical care on the municipalities. As such, the state court's decision was well

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[15] *See Washington* v. *Seattle School District No. 1*, 73 L.Ed.2d 896, 911 & n.18 (1982); *Id.* at 921 & n.7 (Powell, J., dissenting); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981); *Id.* at 479-480 & nn.3-4 (Stevens, J., dissenting); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960); *see Gordon* v. *Lance*, 403 U.S. 1, 6 (1971); *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394 (1919). It is instructive to remember that the more active role of the judiciary in many states has evolved quite naturally from the early days of state government when the courts, acting to develop the common law, were often the primary state lawmaking bodies. L. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 N.Y.U.L. Rev. 1212, 1256 (1978).

[16] A state is "free to decide matters of concern to the State at the State, rather than local, level of government. *Washington* v. *Seattle School District No. 1*, 73 L.Ed.2d 896, 919 (1982) (Powell, J., dissenting, on a point with which the majority was in apparent agreement, *id.* at 911 n.18); *Sailors* v. *Board of Education*, 387 U.S. 105 (1967).

within the state's authority and presents no federal question. Revere, on the other hand, argues that this Court must act to correct an alleged error of federal law. In this section, MGH suggests that any doubts as to the source of the law applied by the Supreme Judicial Court should be resolved by declining to review the state court's decision.

This Court's power over state courts is limited to correcting errors in adjudication of federal rights. 28 U.S.C. § 1257(3); *see Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1875) (*dicta*). Because of the prohibition on advisory opinions, the Court has consistently refused to consider judgments of state courts which rest on both federal grounds and on adequate and independent state grounds. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). Where the federal bases for the state decision are constitutional grounds, this approach also finds support in the policy of avoiding unnecessary decision of constitutional issues. *See Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584 (1947) (constitutional issue must be "clean-cut," "concrete" and "unclouded").

If it is not clear whether the decision below rests on state law, federal law, or both, this Court should dismiss the case because the petitioner has not sustained the burden of establishing jurisdiction,[17] or should vacate the decision and remand it to the state court "for the elimination of obscurities and ambiguities." *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 71 L.Ed.2d 152, 163 & n.19 (1982).[18] Regardless of the particular

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[17] *See, e.g., Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965) (despite the state court's extensive use of federal authority, case dismissed because the extent of possible state law grounds was unclear); *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956) (petitioner must show that state court decision could not possibly rest on non-federal grounds); *Stembridge* v. *Georgia*, 434 U.S. 541, 547-548 (1952) (no jurisdiction where possibility of adequate state ground is even debatable); *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649 (1942); *Klinger* v. *Missouri*, 13 Wall. 257 (1871); *Patsy* v. *Florida Board of Regents*, 73 L.Ed.2d 172, 193 & n.10 (1982) (Powell, J., dissenting).

[18] Dismissal is the more appropriate action unless the Court finds a particular interest in further clarification and development of law in the area. *Cooper* v. *Mitchell Brothers*, 70 L.Ed.2d 262, 269 (1982) (Stevens, J., dis-

disposition, the Court should adhere to its policy of not considering the merits if the source of the law applied below is unclear. As the Court has observed, caution in this regard

> is not merely a technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

Minnesota v. *National Tea Co.*, 309 U.S. 551, 557 (1940). Accordingly, in doubtful cases

> it seems consistent with the respect due the highest courts of the states of the Union that they be asked rather than told what they have intended. If this imposes an unwelcome burden it should be mitigated by the knowledge that it is to protect their jurisdiction from unwitting interference as well as to protect our own from unwitting renunciation.

Herb v. *Pitcairn*, *supra*, 324 U.S. 128; *Oregon* v. *Hass*, 420 U.S. 714, 727 (1975) (Marshall, J., dissenting).

In the present case, the Supreme Judicial Court clearly recognized the federal Constitution as the underlying source of Kivlin's right to medical treatment. As argued above, it is reasonable to read the state court's opinion as fashioning a state remedy to implement that constitutional right — as an exercise of the state's discretion to adopt its own procedures to insure the substantive rights provided by the Constitution.[19] But insofar as this Court may be unsure of the extent to which

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senting); *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194, 200-201 (1965) (most states had statutes similar to the one at issue). Alternatively, this Court might certify questions to the state court. *See* Supreme Judicial Court Rule 3:21, 359 Mass. 790 (1971); *cf. Zant* v. *Stephens*, 72 L.Ed.2d 222, 227 (1982); *Bellotti* v. *Baird*, 428 U.S. 132, 151 (1976).

[19] When the Supreme Judicial Court has acted strictly under the compulsion of federal law, it has known how to say so. *E.g.*, *Commonwealth* v. *Sheppard*, 387 Mass. 488, 489 (1982) ("We conclude that, *solely on the basis of the opinions of the Supreme Court of the United States*, the exclusionary rule requires the suppression of the evidence . . .") (emphasis added).

the Supreme Judicial Court believed itself to be fashioning Massachusetts law rather than simply stating an inexorable command of the federal Constitution, a decision on the merits would be inappropriate.[10]

IV. Even If This Court were to Review the State's Remedy, it Should Do So With Deference.

In the preceding section, MGH suggests that the remedy adopted by the Supreme Judicial Court does no more than place financial responsibility, at least in the first instance, on municipal corporations as a matter of state law in order to protect constitutional rights of pre-trial detainees. Now MGH argues that Massachusetts is free to carry out the mandate of the Constitution within broad limits and with particular attention to its own structural and legal principles, and that even if this Court were to review the state's remedy it should do so with considerable deference to the state's interests.

This case does not concern the question of whether Revere was under a constitutional obligation to insure that Kivlin received prompt medical treatment. Revere agrees that it

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[10] Refusal to reach the merits of the case would have several significant virtues. It might allow this Court to avoid unnecessary constitutional decision. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 71 L.Ed.2d 152, 163 (1982); *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 510-511 (1972); *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944); *see Larson* v. *Valente*, 72 L.Ed.2d 33, 65 (1982) (Rehnquist, J., dissenting). It would acknowledge that the state court is in the best position to express the "complete product" of its legal system, *Harrison* v. *NAACP*, 360 U.S. 167, 178 (1959); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) at 439 (Burger, C.J., dissenting) and 443-445 (Black, J., dissenting), and to resolve the essentially local problem of balancing costs of providing medical treatment without federal intrusion and possible disruption of the state system through an erroneous construction of the opinion below, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 500 (1941); *see Rose* v. *Lundy*, 71 L.Ed.2d 379, 387 (1982). And, given the likelihood that the Supreme Judicial Court would reach the same conclusion under the state constitution, *see* 385 Mass. 776 n.6, a decision of this Court on the merits may thereafter prove to have been purely advisory, *Mills* v. *Rogers*, 73 L.Ed.2d 16, 25-27 (1982); *see Oregon* v. *Hass*, *supra* at 726 (Marshall, J., dissenting), and a needless imposition on the Court's workload, *see Webb* v. *Webb*, 68 L.Ed.2d 392, 399 (1982); *Idaho Department of Employment* v. *Smith*, 434 U.S. 100, 104 (1977) (*per curiam*) (Stevens, J., dissenting in part).

was. Nor does the state court decision raise the general issue of whether the government has an affirmative obligation to provide funds for individuals' exercise of their constitutional rights. *Compare Harris* v. *McRae*, 448 U.S. 297 (1980) (government may not interfere with right to abortion but is not required to pay). Clearly, most constitutional provisions limit the government's coercive power without imposing affirmative requirements of financial support. But the government's obligations become correspondingly greater when it has already taken affirmative steps to exert control over a person and limit his freedom of movement and personal autonomy. Similarly, the ability of a court (and especially a *state* court) to fashion relief that protects constitutional rights increases as well.

As a matter of federalism, the state courts have a legitimate interest in protecting individuals' constitutional rights within the state judicial system so that resort to the federal courts is unnecessary.[21] The institutional litigation of the past decade clearly shows that many federal courts have ordered improvement in jails and prisons, including improved delivery of medical care.[22] These same concerns need not always be ad-

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[21] The state courts have the "front-line responsibility for the enforcement of constitutional rights." *Gideon* v. *Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring); they are as bound as the federal courts to "guard and protect rights secured by the Constitution," *Ex Parte Royall*, 117 U.S. 241, 251 (1886), and this Court presumes that the states will be attentive to constitutional requirements, *Rhodes* v. *Chapman*, 452 U.S. 337 (1981). "[I]n the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones." H. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1401 (1953). Commenting specifically on the protection of prisoners' constitutional rights, this Court has observed that "federal-state comity" reflects "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Webb* v. *Webb*, 68 L.Ed.2d 392, 399 (1982), quoting *Picard* v. *Connor*, 404 U.S. 270, 275 (1971).

[22] Alabama has been ordered to identify the physical and mental health-care requirements of its inmates and to hire a specified number of mental health professionals. *Pugh* v. *Locke*, 406 F. Supp. 318, 329, 333 (M.D. Ala. 1976) *reversed on other grounds sub nom. Alabama* v. *Pugh*, 738 U.S. 781

dressed after the constitutional right has been violated. A state is permitted to adopt, on its own initiative, a remedial rule designed to reduce substantially the likelihood that detainees' constitutional rights would be violated in a foreseeable class of occasions: when ill or injured detainees are brought to a hospital for necessary treatment. The remedy selected, here

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(1978); *see also Newman* v. *Alabama*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). Arkansas has been instructed to create a plan "ensuring that every inmate in need of medical attention will be seen by a qualified physician when necessary." *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194, 204 (8th Cir. 1974). Florida has been told to care for the minor injuries and illnesses of its prisoners and detainees, as well as their major emergencies, and to provide both curative and preventive dentistry. *Jones* v. *Wittenberg*, 330 F. Supp. 707, 718 (N.D. Ohio 1971), *aff'd sub nom. Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972). Florida has also been directed to give a physical examination to each new pre-trial detainee, and to hire dermatologists and opthamologists. *Miller* v. *Carlson*, 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd* 563 F.2d 741 (5th Cir. 1977).

Massachusetts has received constitutionally-based instructions from the federal courts regarding medical care of pre-trial detainees. In *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd* 494 F.2d 1196, *cert. denied, sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977 (1974), the district court examined the overall level of care provided at the jail used by Boston (as well as by Revere and other surrounding municipalities) for holding prisoners awaiting trial. The court imposed many specific orders, including the requirement that inmates and pre-trial detainees remaining over seven days must receive complete physicals and those in solitary confinement must get a daily physical examination.

In addition to those cases imposing overall structural remedies on state prison systems, numerous cases have affirmed the prisoner's right to bring an action for damages (or for an injunction ordering treatment) as a result of inadequate or improper medical attention. The two approaches demonstrate that the possible remedies are not mutually exclusive. *See, e.g., Murrell* v. *Bennett*, 615 F.2d 306 (5th Cir. 1980) (bleeding ulcer and urological problems); *West* v. *Keve*, 571 F.2d 158 (3d Cir. 1978) (deliberate indifference to pain of varicose veins and swollen ankle); *Todaro* v. *Ward*, 565 F.2d 48, 52 (2d Cir. 1977) (Kaufman, C.J.) (denials of medical care "which cause or perpetuate pain"); *Bowring* v. *Godwin*, 551 F.2d 44 (4th Cir. 1977) (psychological or psychiatric treatment); *Westlake* v. *Lucas*, 537 F.2d 857 (6th Cir. 1976) (special diet, medication and medical care for bleeding ulcer); *Riley* v. *Rhay*, 407 F.2d 496 (9th Cir. 1969) (treatment for tuberculosis); *Johnson* v. *Harris*, 479 F. Supp. 333 (S.D.N.Y. 1979) (special diet for diabetic); *see also Isaac* v. *United States*, 490 F. Supp. 613 (S.D.N.Y. 1979) (medical care for federal prisoner's stomach disorder). As these cases also show, necessary medical treatment includes more than just emergency care.

the requirement that a municipality pay (at least in the first instance) its detainees' medical bills, is well within the range of reasonable options available to a state and should be respected by this Court.[23]

A. *In Seeking to Insure Protection of Constitutional Rights, Massachusetts May Assume for Itself a Broader Remedial System than the Federal Courts Could Properly Impose.*

A measure of deference to state-created remedies designed to protect constitutional rights is well established and consistent with principles of federalism. When a federal court imposes its own remedy on a state or its subdivisions to redress specific constitutional violations, the court "must take into account the interests of the state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken* v. *Bradley*, 433 U.S. 267, 281 (1977) ("Milliken II"). The scope of the remedy is limited by the "nature and extent of the constitutional violation," so that federal intrusion into state affairs is minimized. *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974) ("Milliken I"), quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980); *Hills* v. *Gautreaux*, 425 U.S. 282, 293 (1976).

If the remedy is merely damages, the state's control of its internal affairs is undiminished. But when the relief is structural — a general implementing rule to deter or prevent future constitutional violations by a state or its subdivisions — federalism demands that the remedy not intrude on the legitimate discretion of the state government to structure its own internal affairs. *Upham* v. *Seamon*, 71 L.Ed.2d 725, 830-831 (1982); *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978)

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[23] The municipality is free, of course, to choose instead to hire its own physicians or to operate its own public hospital. Financial concerns expressed by the City of Boston in its amicus brief in support of the petition for certiorari could presumably be alleviated if Boston brought its detainees to Boston City Hospital rather than to one of the non-governmental facilities (such as MGH) within the city. See n.44, below.

(stricter review of remedy imposed on state by federal court); *Connor* v. *Finch*, 431 U.S. 407, 414 (1977) (recognition of state's policy goals); *Whitcomb* v. *Chavis*, 403 U.S. 124, 160-161 (1971) (federal courts must minimize rejection of state's policy choices).[24] When this Court writes of "Our Federalism," it has in mind

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. *Harris*, 401 U.S. 37, 44 (1971).[25] Thus, even where the Court is firm in announcing a constitutional mandate, it has been careful to leave the states a certain flexibility to implement that rule.

An example is *Griffin* v. *Illinois*, 351 U.S. 12 (1956), which considered whether the Constitution required Illinois to provide indigent criminal defendants with free trial transcripts for appeal. The Court concluded that criminal defendants may not be disadvantaged in their defense solely because of indigency, but, having found a constitutional shortcoming, was scrupulously careful to leave Illinois the flexibility to fashion a remedy: "We do not hold, however, that Illinois must pur-

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[24] Even outside the realm of constitutional remedies, this Court has shown "increasing solicitude for the interests and prerogatives of states." Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1135 (1977). *See, e.g., National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (wages of state employees); *Rizzo* v. *Goode*, 423 U.S. 362 (1976) (misconduct of local police); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (zoning ordinance).

[25] "[T]he authority to make . . . fundamental . . . decisions is perhaps the quintessential attribute of sovereignty." *National League of Cities* v. *Usery*, 426 U.S. 833, 851 (1974). The power to make decisions and set policy gives the states their sovereign nature. *Bates* v. *Arizona*, 433 U.S. 350 (1977). And "each State is sovereign within its own domain, governing its citizens and providing for their general welfare." *Federal Energy Regulation Commission* v. *Mississippi*, 72 L.Ed.2d 532, 558 (1982) (O'Connor, J., dissenting).

chase a stenographer's transcript in every case where a defendant cannot buy it. The [state] Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants." *Id.* at 20. In other words, although Illinois was required by the Constitution to provide indigent defendants with reasonable access to the criminal appeals system,[28] this Court would not intrude into state affairs to the extent of mandating the particular way in which the constitutional infirmity must be remedied: "It is not for us to tell Illinois what means are open to the indigent and must be chosen. Illinois may prescribe any means that are within the wide area of its constitutional discretion." *Id.* at 24 (Frankfurter, J., concurring).

Similarly, this Court was careful to stress that the states (as well as the federal government) must give "Miranda warnings" if they wish to use statements stemming from custodial interrogation "unless other fully effective means are devised to inform accused persons of their right to remain silent." *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). The court stressed that its concern was to deter violations of the Fifth Amendment, not to create and impose a particular remedial system as the exclusive method of insuring compliance:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution . . . . Our decision in no way creates a constitutional straightjacket which will handicap sound efforts to reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting effective enforcement of their criminal laws.

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[28] At least where Illinois had chosen to create such a system. *See McKane* v. *Durston*, 153 U.S. 684, 687-688 (1894).

Id. at 467.[27] Thus the court once again recognized that the states may try, if they wish, to create remedies which protect substantive constitutional rights, and yet are suited to the states' own individual preferences and needs.[28]

Such flexibility is possible because there is more than one way to achieve the important goal of preventing or deterring constitutional violations.[29] Unless an existing remedy is intended to have been exclusive, other alternative remedies are permitted.[30] For example, this Court has allowed a direct cause of action for damages to redress a violation of the Fourth Amendment, even though "other quite adequate remedies" may exist. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392-393 (1971) Black-

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[27] *See Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974) (*Miranda's* "procedural safeguards . . . provide practical reinforcement for the right against compulsory self-incrimination.").

[28] *See New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also Santosky* v. *Kramer*, 71 L.Ed.2d 599, 619 (1982) (Rehnquist, J., dissenting); *Johnson* v. *Louisiana*, 406 U.S. 356, 376 (1972) (Powell, J., concurring); *Chandler* v. *Florida*, 449 U.S. 560, 579 (1981); *Ker* v. *California*, 374 U.S. 23, 32 (1963).

> This state innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote. That novel idea did not bear national fruit for another thirty years. Wisconsin pioneered unemployment insurance, while Massachusetts initiated minimum wage laws for women and minors. After decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation. Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes.

Federal Energy Regulation Commission v. *Mississippi*, 72 L.Ed.2d 532, 565-566 (1982) (O'Connor, J., dissenting) (footnotes omitted).

[29] *See Carlson* v. *Green*, 446 U.S. 14 (1980) (deterrence as major purpose of constitutional remedies). Deterrence is "precisely the proposition" underlying one of the best-known constitutional remedies, 42 U.S.C. § 1983. *Imbler* v. *Pachtman*, 424 U.S. 409, 442 (1976) (White, J., concurring).

[30] *Compare Parratt* v. *Taylor*, 68 L.Ed.2d 420 (1981) (declining to permit action under 42 U.S.C. § 1983 for minimal deprivation of property where state's system of tort remedies provides adequate redress and thus satisfies due process).

mun, J., dissenting).[31] Similarly, in *Carlson* v. *Green*, 446 U.S. 14 (1980), the spouse of a prisoner who allegedly died of medical neglect and mistreatment was allowed to pursue a constitutional remedy because the Federal Tort Claims Act was not intended to be exclusive. *Id.* at 19.

A state court has even more flexibility than a federal court to choose among alternative remedies, because the state may assume on its own initiative more extensive burdens than the constraints of federalism would permit a federal court to impose.[32] *See Harris* v. *Rivera*, 70 L.Ed.2d 530, 537 (1981) ("Constitution does not prohibit state judges from being excessively lenient"). In fact, a state may create remedial schemes which offer surer and more complete protection of federal constitutional rights.[33]

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[31] Indeed, the Court's conclusion was wholly independent of whether the state would prohibit or permit such an action. *Id.* at 392-393. Courts have also allowed direct actions under other provisions of the Constitution. *See, e.g., Davis* v. *Passman*, 442 U.S. 228 (1979) (Fifth Amendment); *Paton* v. *LaPrade*, 524 F.2d 862 (3d Cir. 1975) (First Amendment); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (Sixth Amendment); *Patmore* v. *Carlson*, 392 F. Supp. 737 (E.D. Ill. 1975) (Eighth Amendment); *Howard* v. *Warden*, 348 F. Supp. 1204 (E.D. Va. 1972) (Ninth Amendment), *app. dismissed*, 474 F.2d 1341 (4th Cir. 1973).

[32] Also, the Eleventh Amendment does not act as a limitation on remedies which a state court may adopt.

[33] *Griffin* v. *Illinois*, 351 U.S. 12 (1956), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), implicitly recognized that a state may elect to do more than provide just the minimum protection required by the Constitution. Other opinions of this Court suggest that it is desirable, in a federal system, for the states to do so. In *Crawford* v. *Los Angeles Board of Education*, 73 L.Ed.2d 948 (1982), the Court considered whether a state which had gone beyond the constitutional minimum to remedy segregation could subsequently withdraw its extra state remedies. "[C]ertainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities." *Id.* at 957. Thus the Court not only presumed California could properly have provided the greater remedy but clearly believed it desirable that a state should do so as a matter of its own law. *See Palmer* v. *Thompson*, 403 U.S. 217, 228 (1971) ("locking in" state to more expansive remedy "would plainly discourage the expansion and enlargement of needed services in the long run.") (Burger, C.J., concurring).

Indeed, states will frequently adopt a remedial rule before the Court imposes it under the Constitution — sometimes even in the face of express pronouncements that the remedy is not constitutionally required. Despite the holding of *Wolf* v. *Colorado*, 338 U.S. 25 (1949), finding the states free to use evidence resulting from an illegal search and seizure, more than half the states had already adopted some form of exclusionary rule on their own initiative, and several states first adopted their exclusionary rule *after Wolf* held the rule was constitutionally unnecessary. *Mapp* v. *Ohio*, 367 U.S. 643, 651 (1961); *Elkins* v. *United States*, 364 U.S. 206, 219 (1960) (collecting state citations in Appendix, Table II, at 226-232). This Court did not object to individual states adopting procedural stafeguards that were beyond the minimum requirements of the Constitution as then interpreted; indeed, when *Mapp* v. *Ohio* finally extended the Fourth Amendment to the states through the Fourteenth, the Court "commended" California on its voluntary adoption of the exclusionary rule. *See Ker* v. *California*, 374 U.S. 23, 31 (1963).

Before *Gideon* v. *Wainwright*, 372 U.S. 355 (1963), finally overruled *Betts* v. *Brady*, 316 U.S. 455 (1945), more than thirty-five states were already "unnecessarily" providing counsel to indigent defendants in felony cases regardless of "special circumstances." *McNeal* v. *Culver*, 365 U.S. 109, 119-122 (1961) (appendix to concurring opinion of Douglas, J.). *See* Y. Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused, 30 U. Chi. L. Rev. 1, 17 (1962) (updating the *McNeal* data and surveying local *practice* in states that did not formally provide for assigned counsel in all felony cases, *id.* at 20 and 67-70).[34]

And even when federal law is imposed upon them, the states frequently retain at least some lawmaking authority. In

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[34] A more current example is that although this Court holds that the Constitution does not require appointment of counsel in cases where imprisonment is authorized but not actually imposed, a substantial number of states go further and assign counsel whenever a criminal sentence is possible. *Scott* v. *Illinois*, 440 U.S. 367, 386-388 & nn.18-22 (Brennan, J., dissenting) (1979).

determining the scope of remedies for violation of constitutional rights, this Court often looks to the law of the state in which the violation occurred. In *Robertson* v. *Wegmann*, 436 U.S. 584, 594 (1978), the Court incorporated state survivorship law to determine whether a § 1983 action was abated by the death of the plaintiff.[35] "Federal courts routinely refer to State law to fill the procedural gaps in national remedial schemes." *Carlson* v. *Green*, 446 U.S. 14, 29 (1980) (Powell, J., concurring).[36]

The conclusion is clear: although the states' remedial efforts may not lag behind constitutional requirements, they may well run ahead. That is not to say that the state courts may decide a case contrary to the underlying *substantive* mandates of the Constitution. *See Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981); *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975).[37] In order to insure that the sub-

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[35] Similarly, this Court has found in the common law of torts the general rules for damages in constitutional torts, *Carey* v. *Piphus*, 435 U.S. 247, 257-258 (1978), and for immunities under § 1983, *Imbler* v. *Pachtman*, 424 U.S. 409, 417-419, 424 (1976), and has looked to the law of the forum state to determine the limitations period in suits brought in federal court under the Civil Rights Statutes, *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914); *see also, e.g., Beard* v. *Stephens*, 372 F.2d 685, 688 (5th Cir 1967). 42 U.S.C. § 1988 instructs the courts "to look to the principles of the common law, as altered by state law," as the basis for remedies. *Moor* v. *County of Alameda*, 411 U.S. 693, 702-703 (1973); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

[36] The proposition is even more familiar outside the constitutional sphere. *See, e.g., U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Textile Workers of America* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957); *DeSylva* v. *Ballentine*, 351 U.S. 570 (1956); *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204 (1946).

[37] In *Hass*, the state court imposed greater "restrictions as a matter of *federal constitutional law* when this Court specifically refrained from imposing them." *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975) (emphasis in original). *See also Fare* v. *Michael C.*, 442 U.S. 707, 717 (1979); *North Carolina* v. *Butler*, 441 U.S. 369 (1979). The case at hand is much different. The state court decision does not impose any restrictions; it simply adopts a remedy designed to decrease the likelihood of violations of an accepted constitutional norm. It is suggested that *Hass* not be extended so as to preclude all such remedial experimentation on the part of the states, particularly where there is no risk that a particular remedy "would cut this Court's holding[s] . . .

stantive command is heeded, however, the state may fashion a remedial rule to implement the constitutional requirement.[38] *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (Congress may adopt a more expansive remedy than the minimum required under the Equal Protection Clause). This flexibility afforded to the states is grounded in principles of federalism and in a practical recognition that in choosing among available alternatives (which is the essence of fashioning a remedy), a state is often in a better position to decide. The applicability of this general principle to the present case is discussed next.

B. *The Remedial System Adopted by the Supreme Judicial Court Reflects that Court's Greater Familiarity with Massachusetts Laws and Concerns.*

As a general matter, the courts sitting within a state are likely to be more familiar than this Court with the "legal and practical factors" affecting the state.[39] The state's highest

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completely loose from [their] explicitly stated rationale." *Beckwith* v. *United States*, 425 U.S. 341, 345 (1976).

Furthermore, *Hass* has not escaped criticism on the ground that the Constitution is "a fundamentally democratic document, open to competing interpretations" which may vary slightly from state to state, and a state should not necessarily be considered "in error" if it chooses to take a broader view of a constitutional provision. L. Tribe, *American Constitutional Law*, § 3-5 at 33 (1978).

[38] In some situations, the state's interest in creating its own remedial structure appropriately tailored to its own needs and circumstances will conflict with a countervailing federal interest. In these cases, federal law is supreme and will clearly prevail. See pp. 28-29, below.

[39] *See Upham* v. *Seamon*, 71 L.Ed.2d 725, 731 (1982) (greater familiarity of United States District Court); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 71 L.Ed.2d 152, 162 (1982) (greater familiarity of Court of Appeals); *Webb* v. *Webb*, 68 L.Ed.2d 392, 399 (1982) (give state an opportunity to construe its own law authoritatively and to identify and satisfy any state interests); *Harrison* v. *NAACP*, 360 U.S. 167, 178 (1959) (look first to state court's interpretations "so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court"); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 439 (1971) (Burger, C.J., dissenting) (abstain to permit state courts to dispose of claim under state or federal Constitutions); *cf. Board of Education* v. *Pico*, 73 L.Ed.2d 435, 444 (1982) (general rule of

court is often in the best position to evaluate the potential of a particular remedy in preventing violations of constitutional rights.[40] In the present case, the extra familiarity of the Supreme Judicial Court with relevant Massachusetts law and policy concerns is not just a platitude of state judicial competence. The appellate courts of Massachusetts have vigorously sought to resolve many of the important (and often extremely complex) relationships between patients, providers and society.[41] *E.g.*, *Custody of a Minor*, 385 Mass. 697, 434 N.E.2d 601 (1982) (allowing potentially life-prolonging treatment to be withheld from terminally ill child); *In Re Moe*, 385 Mass. 555, 432 N.E.2d 712 (1982) (procedures for deciding whether to permit sterilization of incompetent woman); *Guardianship of Roe*, Mass. Adv. Sh. (1981) 981, 421 N.E.2d 40 (limiting forcible administration of antipsychotic drugs to noninstitutionalized ward); *In Re Spring*, Mass. Adv. Sh. (1980) 1209, 405 N.E.2d 115 (procedure for discontinuing medical therapy and mechanical support of incompetent patient); *Commissioner of Correction* v. *Myers*, 379 Mass. 255, 399 N.E.2d 452 (1979) (government may compel prisoner to submit to necessary medical treatment over his objections); *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978)

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deference to state and local authorities in management of local school affairs); *Larson* v. *Valente*, 72 L.Ed.2d 33, 59 (1982) (White, J., dissenting); *Santosky* v. *Kramer*, 71 L.Ed.2d 599, 621 n.4 (1982) (Rehnquist, J., dissenting) (important to look to full body of state law).

[40] *See, e.g.*, *People* v. *Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905, 911-912 (1955) (noting the failure of remedies other than an exclusionary rule to secure police compliance with the Constitution); *see also* R. Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 321, 332 ("My misgivings about [illegally obtained evidence's] admissibility grew as I observed that time after time it has been offered and admitted as a routine procedure . . .. It had become all to obvious that unconstitutional police methods of obtaining evidence were not being deterred in any other way.").

[41] Many of the decisions have achieved national recognition, and some have generated substantial commentary. Whatever may be the merits of the relative approaches, Massachusetts has clearly insisted on a more active role for the state judiciary than many other jurisdictions in determining the appropriate balance between interests of patients and society. *Compare In re Quinlan*, 40 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Gorger* v. *New Jersey*, 429 U.S. 922 (1976).

("Chad Green" case — state interest in protecting child's life overrides parents' preference for laetrile over chemotherapy); *Superintendent of Belchertown* v. *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (authority of judiciary to implement incompetent patient's right to refuse treatment); *Commonwealth* v. *Golston*, 373 Mass. 249, 366 N.E.2d 744 (1977), *cert. denied*, 434 U.S. 1039 (1978) (determination of death via Harvard "brain death" criteria); *Baird* v. *Attorney General*, 371 Mass. 741, 360 N.E.2d 288 (1977) (right to abortion); *In Re Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978) (interpretation and refinement of the doctrine of *Saikewicz*, *supra*); *Lane* v. *Candura*, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978) (competent patient's right to refuse life-saving treatment).[42]

In addition, Massachusetts has placed considered emphasis on the *government's* (as opposed to just the individual's) interest in adequate medical care for prisoners. In fact, the Supreme Judicial Court cited *Commissioner of Correction* v. *Myers*, 379 Mass. 255, 399 N.E.2d 452 (1979), where a prisoner was compelled to submit to kidney dialysis treatment because a contrary result would have undermined the legitimate institutional concerns of the prison. 385 Mass. at 778 ("[H]ad Kivlin refused the proffered care, he could have been compelled to submit to treatment"). For these same reasons, the Supreme Judicial Court may have felt reluctant to allow a municipality simply to deposit a critically injured detainee at the hospital, leaving the decisions of treatment and payment up to private parties, here the MGH and Kivlin. Although the perceived weight of a state's interest in such matters may well vary, Massachusetts' resolve to avoid any doubt or confusion in hospital emergency rooms should be respected.[43]

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[42] Presumably the state court was also mindful of Massachusetts' efforts to control hospital costs through state regulation. See Section V, below.

[43] Massachusetts also has a long tradition of concern for the rights of prisoners. The Eighth Amendment prohibition on "cruel and unusual punishment" was taken verbatim from the English Declaration of Rights of 1688. Even before that formal recognition of the prohibition in England, however, it had already appeared in Nathanial Ward's Massachusetts *Body of Liberties*

The Supreme Judicial Court began its analysis in this case with a detailed review of the state law of contract and *quantum meruit*. Only after concluding that Massachusetts law provided no basis for recovery under these theories did the court find it necessary to fashion a remedy to implement substantive constitutional rights.[44] Other states have found in their own laws different solutions to the same problem.[45] Just as this Court has often been reluctant to require states to adopt a specific, invariable approach to protect constitutional rights,[46] it should be still more hesitant to prevent an individual state from adopting whatever remedy the state finds most appropriate in light of its own needs and experiences.[47]

No federal law preempts the state's selection.[48] Nor is there a federal interest in a national law of prisoners or detainees

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(1641). Ward's formulation was incorported into the Massachusetts Code of 1648, and was repeated in the Colonial Laws of Massachusetts of 1660 and 1672. Note, 34 Minn. L. Rev. 134, 135-136 (1950).

The premise that Massachusetts has a strong interest in the well-being of its prisoners draws in another thread of state common law. Under Massachusetts law, parents have the duty to provide and guarantee adequate medical care for their children. *See Stimpson* v. *Hunter*, 234 Mass. 61, 125 N.E. 155 (1919). A provider of medical services can look to parents in the first instance, even though others may be ultimately liable.

[44] The Supreme Judicial Court presumably also recognized that, like the City of Boston, virtually all large Massachusetts municipalities (where most of these cases are likely to arise) already have public supported acute care hospitals capable of providing necessary medical services for detainees.

[45] *E.g.*, *Hospital Services, Inc.* v. *Duman*, 297 N.W.2d 320 (N. Dak. 1980); *Mt. Carmel Medical Center* v. *Board of City Commissioners*, 1 Kan. 2d 374, 566 P.2d 384 (1977); *Tulsa* v. *Hillcrest Medical Center*, 292 P.2d 430 (Okla. 1956); *Spicer* v. *Williamson*, 191 N. C. 487, 132 S.E. 291 (1926) (all under common law); *King County* v. *Seattle*, 70 Wash. 2d 988, 425 P.2d 887 (1967) (en banc) (statute); *but see Lutheran Medical Center* v. *Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979) (Eighth Amendment).

[46] See Section IV(A), above.

[47] Whatever consideration the Court might give to state fiscal constraints when imposing a remedy, *see, e.g.*, *Ross* v. *Moffitt*, 417 U.S. 600, 618 (1974), is irrelevant when the remedy is voluntarily adopted by the state.

[48] Even a conflicting federal law would displace state policies only to the extent of the actual conflict. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *see Toll* v. *Moreno*, 73 L.Ed.2d 563, 588-589 (1982) (Rehnquist, J., dissenting); *cf.* M. Broad, Federal Common Law: Protecting State Interests, 37 Fed. Bar. J. 1 (1978).

that would require a uniform rule. *Compare Carlson* v. *Green*, 446 U.S. 14, 24 & n.11 (1980) (federal law determines survivorship of federal prisoner's action against prison officials) *with Robertson* v. *Wegmann*, 436 U.S. 584, 594 (1978) (state survivorship law applies to state prisoners).[49]

In the present case, Massachusetts has not violated any federal requirement or defaulted in its obligation to protect constitutional rights; rather, the state has been fully attentive in fashioning a remedial structure which effectively deters violation of those rights. In seeking to protect well established constitutional rights, the state court can also make and implement a policy determination that the costs of police protection, including the costs of caring for injured suspects in custody, should be borne by residents of the municipality rather than by patients of the hospital. The state's creation of a remedy appropriately tailored to its own policies and needs is entitled to substantial deference from this Court.[50]

V. Revere's Constitutional Obligation to Provide Necessary Medical Care for Detainees in its Custody Includes, at Least in the First Instance, the Obligation to Pay for That Care.

In the preceding sections of the brief, MGH has argued that this Court ought not review the merits of the state court's ruling in any detail, but should affirm the state's authority to structure an appropriate remedial system to protect constitutional rights or, in the alternative, should dismiss the writ of certiorari or vacate the judgment below and remand the case for clarification or further proceedings. The hospital now

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[49] *Compare also Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), *with United States* v. *Yazell*, 382 U.S. 341 (1966).

[50] "As a sovereign entity, a State is entitled to assess its needs and decide which concerns of its citizens warrant its protection and intervention. I know of nothing — except the Constitution or overriding federal law — that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest." *Alfred L. Snapp & Son* v. *Puerto Rico*, 73 L.Ed.2d 995, 1011 (1982) (Brennan, J., concurring). *See Younger* v. *Harris*, 401 U.S. 37, 44 (1971), *quoted in Webb* v. *Webb*, 68 L.Ed.2d 392, 399 (1982).

demonstrates that even if the Court finds in the opinion below a determination of substantive constitutional rights rather than merely a creation of state procedures to implement rights already established, the judgment should be affirmed.

When the Constitution requires the government to take affirmative steps and provide a particular service, providing generally means paying for. Providing a trial transcript means paying for one if the appellant cannot do so. *See Griffin* v. *Illinois*, 351 U.S. 12 (1956). Providing counsel means paying if the defendant cannot. *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

Nowhere is this principle — the equation of provision of entitlements with payments — clearer than in the institutional litigation of which the present case is but one example. When courts have ordered the states to provide certain services to inmates or detainees as required by the Constitution, that means spending state money. Providing better medical care in a prison means actually providing the care, not just giving inmates an opportunity to purchase care themselves if they have the money or can find a provider willing to treat them. Were the rule otherwise, the prison and state institution cases would not repeatedly assert that a shortage of state funds or lack of legislative appropriation is no excuse for failing to provide the necessary care. *E.g.*, *New York State Association for Retarded Children* v. *Carey*, 631 F.2d 162 (2d Cir. 1980); *Todaro* v. *Ward*, 565 F.2d 48, 54 & n.8 (1977); *Costello* v. *Wainwright*, 525 F.2d 1239, 1252 (5th Cir. 1976); *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194, 201-202 (8th Cir. 1974); *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1313-1315 (5th Cir. 1974); *Gates* v. *Collier*, 501 F.2d 1291, 1319 (5th Cir. 1974); *Welsch* v. *Likins*, 373 F. Supp. 487, 499 (D. Minn. 1974); *see Watson* v. *City of Memphis*, 373 U.S. 526, 537 (1963).

The same equation of *providing* and *paying* underlies the Court's decision last term in *Youngberg* v. *Romeo*, 73 L.Ed.2d 28 (1982). In that case, Pennsylvania acknowledged its obligation to provide committed persons with adequate food,

shelter, clothing, and medical care;[51] this Court held that the Constitution required the state "to provide minimally adequate or reasonable training to insure safety and freedom from undue restraint." *Id.* at 39. In reaching this conclusion, the court was mindful of the potential fiscal impact on the state, *Id.* at 40; *see Parham* v. *J.R.*, 442 U.S. 584, 599-600 (1979), clearly showing again the expectation that the government would be paying for these services. Indeed, if "providing" did not mean "paying" it is doubtful the various governments would have opposed the relief sought in most of these cases.

This is not to say that the government must fund the exercise of every constitutional right. *Youngberg* v. *Romeo, supra*, 73 L.Ed.2d at 38. The government need not make Medicaid funds available for abortions because the state has no affirmative obligation to provide abortions, merely the duty not to interfere with a woman's right to arrange one for herself. *Harris* v. *McRae*, 448 U.S. 297 (1980). Here, by contrast, Revere had already assumed control of Kivlin by shooting him and placing him under arrest (A. 11, 13). *See United States* v. *Mendenhall*, 446 U.S. 544, 553-554 (1980). As a result, Revere did have an affirmative obligation to provide necessary medical care.[52]

Nor must the government in every case bear the ultimate, as opposed to the initial, responsibility for payment. This Court has already noted that many states make criminal defendants ultimately liable for the cost of representation provided at public expense, *James* v. *Strange*, 407 U.S. 128, 132-133 & n.8 (1972), or for the cost of trial transcripts in criminal appeals, *Rinaldi* v. *Yeagar*, 384 U.S. 305 (1966). Viewed this way, the remedial rules of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and *Griffin* v. *Illinois*, 351 U.S. 12 (1956), are only initial

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[51] *Id.* at 36-37 and 42. Twenty-one other states apparently agreed. *Id.* at 37 n.17.

[52] The government's obligation to its citizens is heightened when those citizens are in custody. *See, e.g., Abington School District* v. *Schempp*, 374 U.S. 203, 297 & n.72 (governments' provision of chaplains for prisoners) (*dicta*) (1963).

allocations of fiscal obligations,[53] not preventing the government from seeking reimbursement for its expenditures.[54] Nothing in the Supreme Judicial Court's opinion prevents Revere from seeking reimbursement from the detainee himself or third-party payors, if any.[55] *See Beach* v. *District of Columbia*, 320 F.2d 790, 793 (D.C. Cir. 1963) (secondary obligation on father to pay for incompetent child's treatment in public hospital).

When it imposed the initial obligation for payment upon the government, the Supreme Judicial Court no doubt recognized that pre-trial detainees as a class tend to be poor and might be expected to have less Blue Cross or private insurance

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[53] Although these cases only require government payment on behalf of indigent defendants, it is generally easier to make an accurate determination of indigency in the relative calm of an arraignment than in the excitement of a busy hospital emergency room or intake center Even if the Eighth or Fourteenth Amendments did not require that medical care he furnished without charge to non-indigent prisoners, *see Fant* v. *Fisher*, 414 F. Supp. 807 (W.D. Okla. 1976), constitutional rights will be most fully protected if the hospital is assured of payment from the municipality, with the municipality able to recover in turn from a solvent prisoner or detainee. *See United States* v. *Allen*, 596 F.2d 227 (7th Cir. 1979), *cert. denied*, 444 U.S. 871 (1979) (defendant who misrepresented his financial status ordered to reimburse government for costs of legal services).

Revere does not argue that the state court's decision is too broad because it requires initial payment without regard to indigency. Whether the Constitution requires the municipality to make initial payment in all instances need not be decided in this case. It may be, for example, that when a detainee clearly has sufficient resources, his financial status alone is sufficient guarantee that required medical treatment will be delivered. It should be noted here that in all likelihood Kivlin was indigent; Revere assumes as much by pointing to welfare programs which provide for needy persons (Pet. Br. 14).

[54] Revere implicitly recognized this fact when it filed its cross-claim against Kivlin for reimbursement. Revere also sued the Commonwealth of Massachusetts, claiming that ultimate financial responsibility lay there. Having failed to cross appeal the dismissal of this third-party claim, Revere is now in no position to complain if the ultimate burden in this case rests with it.

[55] Under Massachusetts law, the policeman escorting Kivlin to the hospital would not be *personally* liable for the costs of medical care. Mass. Gen. Laws c. 111C, § 14.

coverage.[56] By guaranteeing that the provider will be paid, the Supreme Judicial Court's rule insures prompt provision of necessary medical care.

Revere tries to shift its own constitutional obligation to provide care onto MGH by arguing that detainees will receive necessary medical attention regardless of payment. The argument is flawed in several respects. First, the "patient's rights" act on which Revere relies was not enacted until the year *after* Kivlin's hospitalization and thus does not apply. Mass. Gen. Laws c. 111, § 70E(k), added by St. 1979, c. 214.[57]

Moreover, the patient's rights statute refers only to emergency treatment, while the government's obligation extends to significant non-emergency treatment as well. See n.22, *supra*. "Many persons [in custody], such as diabetics, asthmatics, epileptics, hypertensives, and cardiacs, require daily medication or immediate access to medical attention at the onset of symptoms." E. Neisser, Is There a Doctor in the Joint: The Search for Constitutional Standards for Prison Health Care, 63 Va. L. Rev. 921, 939 (1977).

Revere also seeks to imply that MGH is required under the Hill-Burton Act, 42 U.S.C. § 291, and other federal funding statutes to provide free care to persons in Kivlin's position.

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[56] This Court has acknowledged reports of 50% to 90% indigency among felony defendants. *Miranda* v. *Arizona*, 384 U.S. 436, 472 n.40 (1966). The primary occupants of American jails are untried defendants too poor to purchase their freedom with bail. Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L. J. 941, 941 (1970). There are about 100,000 pretrial detainees in United States jails; depending on the jurisdiction, the average period of detention ranges from six weeks to eight months. *Id.* at 942. Massachusetts is in the middle of the range. *See Inmates of Suffolk County* v. *Eisenstadt*, 360 F. Supp. 676, 687 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (1st Cir.), *cert. denied sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977 (1974) (two to six months or more at Charles Street Jail — where Revere brings its detainees, A. 14).

[57] Because this statute was not raised below and this provision of the statute has never been interpreted by the state supreme court, this Court should in any case decline to base its decision on that ground. It is for the Supreme Judicial Court to say whether the remedy applied in the next case should be changed in light of the legislative action. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 500 (1941).

Because this claim was never raised in the state courts, MGH presented no evidence on the issue, but now represents to this Court that the hospital's Hill-Burton obligations had been fulfilled before Kivlin's hospitalization and that MGH had no obligation to provide such care pursuant to any federal enactment.[58] What Revere fails to mention is the tremendous financial pressure that has been brought to bear on Massachusetts hospitals. Massachusetts is one of the few states to regulate directly hospital charges. Mass. Gen. Laws c. 6A, §§ 37-46, instructs the state's Rate Setting Commission to fix the rates paid to providers.[59] In addition, since 1980 special statutory enactments have established overall ceilings on a hospital's total revenue increases. *See* Mass. St. 1980, c. 540; St. 1981, c. 432; and St. 1982, c. 372. Taken together, the two sets of laws restrict a hospital's ability to raise its rates or to increase its total revenues.[60]

Because of these statutes, MGH anticipates revenue of approximately $17 million less than its projected need for the

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[58] The federal government takes the position that Medicare payments "may not be made for items or services rendered to prisoners, since the state (or other government component which operates the prison) is responsible for their medical and other needs. For this purpose, the term 'prisoner' means a person who is in the custody of the police, penal authorities, or other agency of a governmental entity." Department of Health and Human Services (Health Care Financing Administration), Medicare Hospital Manual § 260.3 (Aug. 10, 1982), also appearing in CCH, Medicare and Medicaid Guide § 4050, at p. 1419 (Nov. 1982).

Similarly, Medicaid is not available for inmates. 42 C.F.R. §435.1008(a)(l), § 435.1009. See L. King, *Public Police and Administrative Aspects of Prison and Jail Health Services*, reprinted in A.C.L.U. National Prison Project, *Representing Prisoners*, at 377 n.10 (1981) (noting exclusion of jail and prison health service from public and private reimbursement programs). Even without these exclusions, of course, a prisoner will not be eligible for Medicare or Medicaid unless he satisfies the particular requirements of the program.

[59] The rates thus set are *maximum* charges; only commercial insurance carriers and self-pay patients pay charges. Reimbursement under Medicaid, Medicaid and Blue Cross is lower.

[60] If adopted, proposed regulations of the Department of Health and Human Services curtailing compensation for the services of "physicians practicing in the institutional setting" will exacerbate the fiscal problem. See 47 Fed. Reg. 43578 *et seq.* (Oct. 1, 1982).

current fiscal year.[61] As a result MGH, like most Boston area hospitals, has had to take drastic action to deal with the anticipated shortfall. The hospital adopted a budget reduction program, including a self-imposed hiring freeze effective July 26, 1982, pursuant to which new personnel may not be hired and vacant positions may not be filled without special permission of the newly created Resource Allocation and Position Review Committees. The hospital eliminated its traditional policy of providing annual raises on employees' service anniversary dates. And MGH is currently in the process of revising its free care policy to reduce the circumstances in which it will provide medical services without regard to ability to pay.

For all these reasons, it cannot be asserted with any confidence that Massachusetts prisoners and detainees will automatically receive all necessary hospital care regardless of financial resources. Governmental policies are forcing Massachusetts hospitals to reevaluate all their services, and their free services most of all.[62] In the present financial climate, it is reasonable to expect that many hospitals in the state will decline to provide free care whenever possible. As Revere demonstrates by its position in this litigation, hospitals in Massachusetts cannot rely on municipalities to pay voluntarily for treatment provided to detainees.[63]

Under these circumstances, the rule adopted by the Supreme Judicial Court is an important step toward protecting the constitutional rights of those in custody. Other possible prisoners' remedies, such as tort damages or habeas corpus,

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[61] This estimate assumes essentially no expansion of hospital services, since in most cases the revenue cap prevents the hospital from increasing its aggregate revenues enough to cover the added cost of new services.

[62] Because of the revenue cap, an increase in free care will not be reimbursed by the third-party charge payors.

[63] Any fiscal constraints imposed on Revere by St. 1980, c. 580 ("Proposition 2½") may be overridden by vote of the City's residents. The Massachusetts "revenue cap," by contrast, does not permit an override by the hospitals. Although Revere makes no showing that an override would be needed, the City has in any case no right to be free of costs of insuring that constitutional rights are respected. *City of Monell* v. *Department of Social Services*, 436 U.S. 658 (1978).

are inadequate because they are available only *after* a failure to provide treatment has occurred. The ultimate goal of the Fourteenth Amendment is to prevent constitutional violations from occurring, not merely to provide monetary redress after the fact. *See Parratt* v. *Taylor*, 68 L.Ed.2d 420, 435 (1981) (Blackmun, J., concurring) (greater concern over deprivations of life and liberty); *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1316 (5th Cir. 1974) (Wisdom, J.).

The remedial rule adopted by the Supreme Judicial Court also has the virtue of simplicity. This Court has on occasion felt the burden of "recurrent inquiry into special circumstances" of individual cases. *Miranda* v. *Arizona*, 384 U.S. 436, 469 n.38 (1966); *Scott* v. *Illinois*, 440 U.S. 367, 378 (1979) (Brennan, J., dissenting). Where the right is as important as physical well-being and the remedy as simple as the one adopted here, there is no excuse for choosing instead to engage in *ex post facto* inquiry into the detainee's medical needs and his financial situation. *See Miranda* v. *Arizona*, *supra* at 373 n.43.

Conclusion.

If this Court reaches the question of constitutional interpretation, it should hold that the Constitution requires municipalities to bear in the first instance the costs of necessary medical care for detainees to insure the care is in fact provided. Alternatively, the Court should not disturb the state's allocation of fiscal responsibility for costs of medical care furnished to pre-trial detaineees because the state remedy is a permissible one under the Constitution.

Indeed, the Court should decline to reach the merits because the Supreme Judicial Court's choice of remedy to deter constitutional violations is a matter of state law not properly reviewable by the federal courts. If the Court is concerned that the federal and state law may be intertwined in the decision below, it should find that Revere has not met its

burden of establishing the existence of a fundamental federal question or should remand the case to permit clarification and further action by the Supreme Judicial Court.

The Court need not consider any of these questions, however, for Revere is a creature of the state and thus is not a proper party to challenge fiscal obligations assigned to it by the state. And although MGH believes it is a proper party to assert the rights of detainee patients to necessary medical care, if this Court disagrees and concludes that the federal rules of standing are not satisfied, it should dismiss the writ of certiorari rather than impose the federal rules upon the states.

Respectfully submitted,

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